

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-01-509
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	DECISION NO. 449
LOCAL 646, AFL-CIO,	)	
	)	FINDINGS OF FACT, CONCLUSIONS
Complainant,	)	OF LAW, AND ORDER
	)	
and	)	
	)	
CHERYL OKUMA-SEPE, Director, Depart-	)	
ment of Human Resources, City and County of	)	
Honolulu and JEREMY HARRIS, Mayor, City	)	
and County of Honolulu,	)	
	)	
Respondents.	)	
	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 8, 2002, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against CHERYL OKUMA-SEPE (OKUMA-SEPE), Director, Department of Human Resources, City and County of Honolulu and JEREMY HARRIS, Mayor, City and County of Honolulu (collectively City, Employer or Respondents) for failing to select an arbitrator in UPW grievance CZ-02-11 within 14 calendar days after the Union's notification of its intent to proceed to arbitration. The Union contends that said failure violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(1) and (8).

On August 9, 2002, the UPW filed a Motion for Summary Judgment in this case. On August 19, 2002 Respondents filed its Memoranda in Opposition to the Motion for Summary Judgment. And on August 20, 2002 the UPW filed its replies thereto. On August 23, 2002, the Hawaii Labor Relations Board (Board) held a hearing on the motions.<sup>1</sup> Thereafter, the Board issued Order No. 2119, Order Consolidating Cases to Dispose of the

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<sup>1</sup>At the hearing, the parties agreed not to consolidate this case with Case No. CE-01-508 for disposition. However, in reviewing the record, the Board found that the same parties were involved and similar issues were presented for consideration, and thus contemporaneous consideration of the summary judgment motions was conducive to the proper dispatch of these issues. Accordingly, the Board, on its motion, consolidated these proceedings with those of Case No. CE-01-509 for the purposes of the motion for summary judgment pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(13).

Instant Motions and Granting, in Part, and Denying, in Part, UPW's Motions for Summary Judgment on September 30, 2002. In its Conclusions of Law, the Board concluded that Respondents violated the collective bargaining agreement between Complainant and Respondents and granted summary judgment in favor of the Complainant. In Order No. 2119, the Board stated:

4. In the instant cases, the Board finds that the Employer was responsible for the tardy appointment of arbitrators in excess of 14 days and was thus in violation of the collective bargaining agreement.
5. However, the actions of the Employer in each case raise material issues of fact regarding whether the City proceeded in derogation or indifference to its obligations and wilfully violated the agreement.

#### ORDER

Based on the foregoing, the Board hereby grants summary judgment in favor of the UPW to the extent that the Board concludes that the Employer violated the contract. The issue of whether Respondents wilfully violated the collective bargaining agreement remains for further hearing.

On October 23, 2002 and November 6, 2002, the Board held a hearing on the issue of wilfulness and the parties submitted written arguments on January 3, 2003.

After full and fair consideration of the evidence in the record and the arguments of the parties, the Board hereby makes the following findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

1. The UPW was certified as the exclusive bargaining representative of nonsupervisory blue collar employees of the State and counties in bargaining unit 01 on October 20, 1971.
2. OKUMA-SEPE is the Director of the Department of Human Resources with the City and County of Honolulu and is a representative of the Mayor and an employer within the meaning of HRS § 89-2.

3. Since 1972 approximately 12 successive collective bargaining agreements covering Unit 01 employees have been negotiated between the UPW and the various public employers, including the City and County of Honolulu.
4. The Unit 01 agreement provides a three-step grievance procedure in Section 15 which culminates in arbitration of contractual disputes. The Union provides a notice of intent to arbitrate at the third step.
5. The process which leads to the selection of an arbitrator is set forth in relevant portions of the agreement as follows:

**15.16 STEP 3 ARBITRATION.**

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

**15.17 SELECTION OF THE ARBITRATOR.**

Within fourteen (14) calendar days after the notice of arbitration, the parties shall select an Arbitrator as follows:

**15.17a.**By mutual agreement from names suggested by the parties. [Emphasis added.]

6. On or about April 9, 2002, the UPW filed grievance CZ-02-11 on behalf of a Unit 01 member who had been suspended for four days.
7. Steps 1 and 2 of the grievance process were completed on or about May 21, 2002 and on May 29, 2002 the Union issued a notice of intent to arbitrate the grievance and proposed a list of arbitrators.
8. On or about June 27, 2002, the Employer proposed alternative arbitrators.
9. The Employer represents that it does not know what occurred during the period between the notice of intent to arbitrate and its response with a list of proposed arbitrators.
10. On or about July 1, 2002, the UPW requested that the Board provide a list of arbitrators. The Board provided the list on or about July 11, 2002.

11. On either July 17 or 18, 2002, Rodrigues spoke by phone with Chun-Carmichael regarding the subject grievance. Rodrigues asserts that the conversation was for the purpose of selecting an arbitrator and that Chun-Carmichael was unprepared to proceed and said that she would get back to him. Chun-Carmichael asserts that she subsequently called the UPW on July 18, 2002 and advised that she would be on leave until the end of July 2002.
12. On or around July 24, 2002, Rodrigues sent a letter to OKUMA-SEPE seeking to initiate arbitrator selection from the Board list.
13. On August 8, 2002, the UPW filed the instant complaint.
14. On August 12, 2002, Chun-Carmichael both called and wrote Rodrigues to request that the parties proceed with the selection of an arbitrator.
15. Relevant City officials handling the instant grievances (Okuma-Sepe, Chun-Carmichael, Neufeld and Lau) each were aware of the applicable contractual deadlines.
16. The City kept a computerized database of BU 01 grievances but the database contained no contractual deadlines. Nor did the City maintain any other uniform system or procedures in which to keep track grievance procedure deadlines.
17. With respect to the 14-day appointment of arbitrator provision, historically in most cases the City does not strictly comply with the requirement.
18. Such noncompliance is the result of: 1) the UPW never before insisting on compliance; 2) a policy favoring negotiated settlement whenever possible; 3) a policy and comity and cooperation between respective counsel; and 4) the practical impossibility of developing and exchanging any counter-offered list within the timeframe.
19. Within two months of processing the instant grievances, appointment of arbitrators was made more difficult by a policy adopted by the UPW that only Rodrigues was empowered to consent to the appointment of arbitrators, and an understanding by Chun-Carmichael that Rodrigues would communicate only with her on such appointments.
20. In the instant case, it was the City's understanding of the UPW's policy that prevented employees other than Chun-Carmichael from calling Rodrigues regarding the appointment of an arbitrator.

## DISCUSSION

In Board Order No. 2119, the Board granted UPW's motion for summary judgment with regard to the Respondents' contractual violation. The Board, however, denied the motion with respect to whether the violations constituted prohibited practices because there remained issues of fact regarding whether the contractual violations were wilful. In reaching this conclusion the Board relied on the ruling in Decision No. 429, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 215 (2001) (Okuma-Sepe I), to the effect that "in cases involving the missing of deadlines, wilfulness will henceforth be presumed only when there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations." So the only issue remaining in the proceeding is whether there is the necessary substantial evidence of conscious derogation or indifference to contractual obligations to constitute a wilful violation and a prohibited practice.

### **Wilfulness**

In order to find that a violation of a collective bargaining agreement constitutes a prohibited practice, the Board must conclude that the violation was wilful.<sup>2</sup> In Decision No. 429, Okuma-Sepe I, *supra*, the Board identified the standard to be applied in finding wilfulness in cases involving the missing of deadlines:

In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583 (1996), the Board discussed the element of "willfulness":

...[T]he Board, while acknowledging its previous interpretation of "willful" as meaning "conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS" nevertheless stated that "wilfulness can be presumed where a violation occurs as a natural consequence of a

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<sup>2</sup>HRS § 89-13 provides in part as follows:

#### **HRS § 89-13 Prohibited practices; evidence of bad faith.**

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

\* \* \*

(8) Violate the terms of a collective bargaining agreement; . . . .

party's actions." [citations omitted, emphasis added.]

In that case, the Board applied this understanding of wilfulness to circumstances very similar to the instant proceeding, the failure of an employer to abide by a contractual requirement that parties meet to select an arbitrator within ten days of the union's notice of intent to arbitrate. The Board concluded:

Thus, based on the evidence before this Board, the Board finds that the natural consequence of the Employer's actions in failing to contact UPW's counsel to select an arbitrator constitutes a delay and frustration of the grievance process. Thus, the Board finds that the Employer's actions in these cases were wilful violations of the contract.

Id.

In the instant case, the Board will similarly presume wilfulness since a violation of the settlement agreement occurred as a natural consequence of the City's failure to initiate the appointment of arbitrators.

This is not to say that the missing of any contractual or bargaining deadline will be presumed to constitute a wilful violation of HRS § 89-13. For to do so would be to reduce them to strict liability offenses in contravention of the Legislature's probable intent regarding state of mind. Therefore, in cases involving the missing of deadlines, wilfulness will henceforth be presumed only when there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations. [Emphasis added.]

Id., at pp. 220-21.

Respondents argue that the record at summary judgment is devoid of the requisite "substantial evidence. . .of [its] conscious derogation of, or indifference to, its contractual or bargaining obligations," such that summary judgment must be denied.

The Union argues that the Employer has engaged in a pattern of wilfully failing to meet its contractual obligation with respect to the appointment of arbitrators. The Board in Okuma-Sepe I, *supra*, found a prohibited practice with respect to 39 such failed appointments by the City. In Order No. 2115, September 6, 2002, United Public Workers, AFSCME, Local 646, AFL-CIO, Case No. CE-01-507 (Okuma-Sepe II), *supra*, the Board found a violation where the Employer refused to proceed to arbitration because of a contested issue of arbitrability. In both cases, the Board concluded that there existed substantial evidence of at least an indifference to the Employer's contractual obligations which supported a presumption of wilfulness. The Union argues that the City's failure to appoint arbitrators in the instant cases constitutes a part of a continued indifference or hostility so that wilfulness can be similarly presumed.

The record in this case is devoid of any timely good faith attempt at compliance with the applicable contractual provisions. Instead, the noncompliance stemmed from routine Human Resources administration which more than evidences indifference to the contractual deadlines.

The evidence adduced at the evidentiary hearing included an admission that with respect to the 14 day appointment of arbitrator provision, historically in most cases the City does not strictly comply with the requirement. The City represented that the history of noncompliance is the result of: 1) the UPW never before insisting on compliance; 2) a policy favoring negotiated settlement whenever possible; 3) a policy and comity and cooperation between respective counsel; and 4) the practical impossibility of developing and exchanging any counter-offered list within the timeframe. Thus the City had practically reduced noncompliance to a unilateral policy.

This practice and policy leads the Board to conclude that the City's violation of the agreement was wilful. And accordingly, the Board concludes the City committed a prohibited practice with respect to the instant grievance.

In the instant proceeding, the City argued that its noncompliance should be excused because within two months of processing the instant grievance, the appointment of arbitrators was made more difficult by a policy adopted by the UPW that only Rodrigues was authorized to consent to the appointment of arbitrators, and an understanding by Chun-Carmichael that Rodrigues would communicate only with her on such appointments. Such a policy did not frustrate the ability of the City to meet its contractual deadlines in this case.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.

2. In Order No. 2119, the Board found that the Employer violated the contractual provision requiring the selection of an arbitrator within 14 days of the Union's notice to arbitrate the grievance.
3. However, in cases involving the missing of deadlines, wilfulness will henceforth be presumed only when there is substantial evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations. Okuma-Sepe I, supra.
4. In this case, the Board will presume wilfulness since the Respondents' failure to meet their contractual obligations in this case occurred in conscious derogation or indifference to its contractual obligations.
5. The Board concludes that Respondents committed a prohibited practice by wilfully failing to select arbitrators in accordance with its contractual obligations thereby violating HRS § 89-13(a)(8).

### ORDER

Based on the foregoing, the Board issues the following:

1. Respondents shall cease and desist from committing the instant prohibited practice and shall comply with the requirements of applicable contractual deadlines in selecting arbitrators.
2. Respondents shall immediately post copies of this decision on their respective websites and in conspicuous places at the work sites where employees of the affected bargaining unit assemble, and leave such copies posted for a period of 60 days from the initial date of posting.
3. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, \_\_\_\_\_ June 15, 2004 \_\_\_\_\_.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA  
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BRIAN K. NAKAMURA, Chair



UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. CHERYL OKUMA-  
SEPE, et al.  
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

/s/CHESTER C. KUNITAKE  
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH  
KATHLEEN RACUYA-MARKRICH, Member

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